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In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES, PETITIONER

v.

N. Y. RAYON IMPORTING CO., INC. (#2) AND ALFRED L. ROSE, NORMAN S. GOETZ, WALTER MENDELSOHN, AND BERNARD D. LANG AS LIQUIDATING DIRECTORS AND TRUSTEES OF N. Y. RAYON IMPORTING CO., INC. (#2)

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1181

UNITED STATES, PETITIONER

v.

N. Y. RAYON IMPORTING CO., INC. (#2) AND ALFRED L. ROSE, NORMAN S. GOETZ, WALTER MENDELSOHN, AND BERNARD D. LANG AS LIQUIDATING DIRECTORS AND TRUSTEES OF N. Y. RAYON IMPORTING CO., INC. (#2)

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above-entitled case on February 4, 1946.

OPINION BELOW

The opinion of the Court of Claims (R. 21–27) has not yet been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on February 4, 1946 (R. 27). The juris-

diction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended, 28 U. S. C. 288 (b).

QUESTION PRESENTED

Whether the Court of Claims, in holding in favor of the claimants in one of three related suits brought to determine the ownership of a customs duty overpayment fund, can include in its judgment against the United States interest on the fund for a period prior to the entry of judgment, notwithstanding the provisions of Section 177 (a) of the Judicial Code.

STATUTE INVOLVED

The pertinent part of Section 177 (a) of the Judicial Code, 28 U. S. C. 284, provides:

> (a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, * * *.

STATEMENT

The instant proceeding (Docket No. 45861 in the Court of Claims) was one of three related suits filed in the court below for the purpose of ascertaining the party or parties entitled to a fund which had been set up as an outstanding liability in the Treasury by direction of the General Accounting Office. Respondents herein

are N. Y. Rayon Importing Co., Inc. (#2)[1] and its "liquidating directors and trustees". In No. 45862, the plaintiffs were N. Y. Rayon Importing Co., Inc. (#1)[2] and its "liquidating directors and trustees". In No. 45863, the plaintiff was Nyrayco Importing & Converting Corporation.[3] The circumstances which raised the question of ownership of the customs duty overpayments and led to the establishment of the fund in the Treasury are as follows:

Rayon #1 was incorporated under New York law on April 26, 1923 (R. 9). Its original name was "N. Y. Artificial Silk Importing Co., Inc.", which name was changed to N. Y. Rayon Importing Co., Inc. by certificate filed on May 4, 1925 (R. 9). Nyrayco was incorporated under New York law on January 30, 1928 (R. 9). Both corporations were engaged in the importation of rayon yarn and, between 1925 and 1929, had paid customs duty assessments on such importations (R. 10). Both corporations claimed that the duties assessed were erroneous and illegal and, prior to March 1, 1930, had filed protests with the Collector of Customs in accordance with applicable tariff act provisions, which resulted in the institution of actions in the United States Customs Court (R. 10).

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[1] Hereinafter called Rayon #2.

[2] Hereinafter called Rayon #1.

[3] In all three cases, the Société Pour Nouveaux Placements de Capitaux was impleaded as plaintiff. The court below dismissed all claims of interest of this company (R. 27).

Rayon #2 was incorporated under New York law on March 1, 1930, for the purpose of acquiring all the assets and assuming all the liabilities of Rayon #1, Nyrayco, and two other corporations in the rayon business, Rayseta Yarns Corp. and Rayonese Yarns Corp. (R. 9–10). On that day, meetings of the boards of directors of these various corporations were held for the formal effectuation of this reorganization (R. 10). Pursuant to a resolution of its board of directors, Rayon #2 offered to acquire from Rayon #1, Nyrayco, Rayseta, and Rayonese the assets of those corporations and to assume their liabilities in consideration of the issuance by Rayon #2 to those corporations, or their nominees, of capital stock of Rayon #2 (R. 10). By resolutions of the respective boards of directors, this offer was accepted by Rayon #1, Nyrayco, Rayseta, and Rayonese, and all assets of the latter four corporations were transferred to Rayon #2 (R. 10).[4] Between March and June 1930, all issued and outstanding shares of stock in Rayon #1, Nyrayco, Rayseta, and Rayonese were de-

[4] The details of these corporate activities on March 1, 1930, are set out in the findings of the court below (R. 10–15). The findings as to the offer by Rayon #2 on March 1, 1930, and its acceptance by the four other corporations on that date (R. 10–12) are duplicated by findings of offers, apparently cross-offers, made by Rayon #1 and Nyrayco to Rayon #2 on March 4, 1930, four days later (R. 13–14). The court below referred to these offers of March 4, as offers which had been accepted by Rayon #2 at a meeting of its board of directors

livered to Rayon #2, which took over the business and all assets of the four transferring corporations and, in turn, issued to their nominee 1,800 shares of capital stock (R. 14).[5]

On February 27, 1930, a few days prior to the reorganization date mentioned above, Rayon #1 filed a verified application with the New York State Department of Taxation and Finance for its dissolution (R. 14–15). The application stated that March 1, 1930, was the date of discontinuance of business, that all of the assets of Rayon #1 had been disposed of, and that Rayon #2 acquired the assets of Rayon #1 and would continue the business formerly conducted by Rayon #1 (R. 15). On March 1, 1930, a Certificate of

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on March 1, 1930 (R. 12–13). The offers made by Rayon #1 and Nyrayco on March 4, 1930 each refer to an attached schedule of corporate assets and liabilities; no such schedules were ever submitted with or attached to the offers (R. 14). Written consents of the stockholders of record of Rayon #1 and Nyrayco to the transfer of all assets of these corporations to Rayon #2 were not signed until some years after the reorganization, by which time at least two of the corporations (Rayon #1 and Rayon #2) had been voluntarily dissolved (R. 14).

[5] Prior to the reorganization discussed above, a French corporation known as Comptoir des Textiles Artificiel was equitable owner of all outstanding shares of stock of Rayon #1, Nyrayco, Rayseta and Rayonese (R. 15). Rayon #2 became the legal owner and holder of such shares of stock pursuant to the reorganization and, in turn, issued all of its capital stock to the Societe Pour Nouveaux Placements de Capitaux, a Swiss corporation controlled by the above-mentioned French corporation (R. 15).

Dissolution was issued by the New York Secretary of State (R. 15).

Rayon #2 was voluntarily dissolved on January 9, 1931, by the filing of a certificate in compliance with the New York law, and the issuance of a Certificate of Dissolution by the New York Secretary of State (R. 15–16). Nyrayco was dissolved on December 16, 1935 by proclamation, under Section 203–a of the New York Tax Law, for nonpayment of franchise taxes (R. 16).

Sometime after the above-described reorganization and the dissolution of all three corporations, the United States Customs Court rendered decisions sustaining the protests which had been filed by Rayon #1 and Nyrayco in connection with the assessment of duties on rayon yarn imported between 1925 and 1929 (R. 16). The decisions were rendered on April 30, 1937, and May 6, 1937, and a reliquidation of the customs entries was directed (R. 16). On reliquidation, the Collector of Customs ascertained that a refund of $362,482.71 was payable on the protests of Rayon #1 and $30,809.75 on the Nyrayco protests (R. 16). After due certification for payment by the Collector of Customs to the appropriate disbursing official, checks were drawn by the Chief Disbursing Officer of the United States, payable respectively to Rayon #1 and Nyrayco (R. 16).*

* One check, in the amount of $2,933.75, was drawn to the Richard Shipping Corporation, the customs house broker of Rayon #1 (R. 16).

These checks were not, however, handed over to Rayon #1 and Nyrayco by the Collector of Customs in view of the fact that both corporations had been dissolved (R. 17). Instead, the Collector of Customs caused the checks to be transmitted to the General Accounting Office "for lawful disposition" (R. 17).[7]

Rayon #2 thereafter requested the General Accounting Office to deliver the above-described checks to it (R. 17). This request was denied, and the Comptroller General deposited the proceeds of the checks in the Treasury in a trust fund entitled "Outstanding Liabilities 1938," pursuant to Section 21 of the Act of June 26, 1934, c. 756, 48 Stat. 1235, 31 U. S. C. 725t.[8] The proceeds still re-

[7] The court below found that the fact of the dissolution of Nyrayco for nonpayment of its franchise taxes was never brought to the attention of the United States Customs Court in connection with the proceedings therein (R. 16). No finding was made with regard to knowledge of the voluntary dissolution of Rayon #1. However, it is obvious that, after the checks were issued and delivered to the Collector of Customs, he had become aware of the dissolution of both corporations (R. 17).

[8] In its opinion, the court below states that the General Accounting Office refused payment of the refund checks, after certification by the Collector of Customs of the amount due and the drawing of the checks by the appropriate disbursing officer (R. 21, 22). As shown above, the Collector of Customs was the prime mover in stopping the delivery of the refund checks after they had been drawn. Thereafter, he forwarded the checks to the General Accounting Office "for lawful disposition" with full notice of the difficulties as to payment which had arisen by reason of the corporate reorganizations and dissolutions set out above. The establishment of the Treasury trust fund mentioned above took place thereafter.

main credited in that account to Rayon #1 and Nyrayco (R. 17).

Certain efforts were made by Rayon #1, Rayon #2 and Nyrayco and their representatives to obtain the Treasury fund. First, a consent decree was entered in a declaratory judgment proceeding in the Supreme Court of the State of New York adjudicating that, as between the three corporations, Rayon #2 was the owner of the customs duty refunds (R. 17). This consent judgment was entered on January 24, 1942, and was forwarded to the General Accounting Office on January 30, 1942, together with a written demand by Rayon #2 for payment to it of the proceeds of the checks (R. 17). The General Accounting Office did not accede to this demand (R. 17). Subsequently, on February 26, 1943, the attorneys for the three dissolved corporations suggested to the Comptroller General that the fund be released to Rayon #1 and Nyrayco with the consent of Rayon #2, each corporation being represented by its director or directors as trustees in liquidation (R. 17–18). The Comptroller General rejected this scheme and stated that payment would be permitted only upon final judgment by a court of competent jurisdiction concluding the issue of ownership. (R. 18.) He suggested that a suit be brought for this purpose in the Court of Claims (R. 18).

As mentioned above, the offer made by the attorneys for the three dissolved corporations on

February 26, 1943, referred to directors of such corporations as trustees in liquidation. Of the three directors of Rayon #1 at the time of its dissolution, two (Max Spinnler and Austin E. Kilkenny) had died by April 1, 1935 (R. 18). On and after that date and at the time of the rendition of the Customs Court's decisions, Charles A. Springstead was the sole surviving director (R. 18). The court below found that, on April 20, 1938, Springstead held a directors' meeting and elected Alfred L. Rose as a director, and Rose and Springstead thereupon elected Norman S. Goetz (R. 18).[9] Of the three directors of Nyrayco at the time of its dissolution, one (Max Spinnler) had died on April 1, 1935 (R. 19); a second (Martin Lowenberg) had resigned on January 22, 1942 and, on and after that date, Samuel W. Lowenberg was the sole surviving director (R. 19). The court below found that, at a meeting of the board of directors of Nyrayco on January 22, 1942, Samuel W. Lowenberg elected Alfred L. Rose as director, and Lowenberg and Rose elected Norman S. Goetz (R. 19).[10] At the time of

[9] Springstead, Rose, and Goetz appeared in the court below as representative plaintiffs in Docket No. 45862 (R. 19).

[10] None of these directors appeared as representative plaintiffs in the court below in Docket No. 45863, the suit brought by Nyrayco. Both Martin Lowenberg and Samuel W. Lowenberg, the latter individually and as attorney in fact for relatives of the deceased Max Spinnler, were ordered to appear before the court below to assert any interest which they might have in the suits (R. 20). No appearance was entered by either (R. 21).

the dissolution of Rayon #2, its directors were Rose, Spinnler and one Hartley Robbins; one vacant directorship existed (R. 19). As noted above, Spinnler died in April, 1935. Robbins died on May 25, 1938 (R. 19). The court below found that, at a meeting of the board of directors of Rayon #2 on June 10, 1938, Rose elected Norman S. Goetz as director, Goetz and Rose elected Walter Mendelsohn, who joined with them to elect Bernard D. Lang (R. 19–20).[11]

Following the suggestion of the Comptroller General that suit be brought in the Court of Claims to determine the question of ownership of the customs duty overpayment fund, the three proceedings mentioned above (*supra*, pp. 2–3) were instituted by complaints filed on April 29, 1943 (R. 20). Amended complaints were filed on January 21, 1944 (R. 20).

On February 4, 1946, the Court of Claims concluded that the respondents herein, Rayon #2, and Alfred L. Rose, Norman S. Goetz, Walter Mendelsohn and Bernard D. Lang, as its liquidating directors and trustees, were entitled to the customs duty fund (R. 21, 27). The court further ordered that the petitions filed by Rayon #1 and its liquidating directors, and by Nyrayco, be dismissed (R. 21). As part of its decision in favor of respondents herein, the court below

[11] Rose, Goetz, Mendelsohn, and Lang appeared in the court below as representative plaintiffs in the instant case (R. 20).

awarded 6% interest on the total fund, such interest to run from April 19, 1941 (R. 21).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In failing to hold that Section 177 (a) of the Judicial Code precluded it from allowing interest upon the instant claim against the United States prior to the time of the rendition of its judgment.

2. In holding itself generally empowered to award interest against the United States whenever, in its opinion, officials of the Government have withheld payment of claims against the Government for more than a reasonable length of time.

3. For failing to hold that interest may not be awarded against the United States in the absence of a specific statutory authorization for such an award.

4. In awarding interest against the United States on judgments of the United States Customs Court despite provisions of the Customs Regulations which expressly prohibit interest on such decisions.

5. In including in its judgment interest on the claim here involved for a period prior to the rendition of such judgment.

REASONS FOR GRANTING THE WRIT

1. No principle of public law is more clearly established than the rule that "* * * the United States are not liable to pay interest

on claims against them, in the absence of express statutory provision to that effect." *Angarica* v. *Bayard*, 127 U. S. 251, 260; *United States* v. *Goltra*, 312 U. S. 203, 207; *Smyth* v. *United States*, 302 U. S. 329, 353; *United States* v. *North Carolina*, 136 U. S. 211, 216; *United States* v. *Sherman*, 98 U. S. 565; 7 Op. A. G. 523; 3 Op. A. G. 635. This "* * * traditional immunity * * *" (*United States* v. *Goltra*, supra at p. 207) is specifically embodied in Section 177 (a) of the Judicial Code which prohibits the allowance of interest by the Court of Claims prior to the date of that Court's judgment unless the claim is founded on a contract expressly stipulating for the payment of interest. *United States* v. *North American Co.*, 253 U. S. 330, 336; *United States* v. *Verdier*, 164 U. S. 213, 218.

In its award of interest to respondents herein, the court below acted in complete disregard of the Government's general immunity from such an award nor did it refer to the specific statutory limitation on its own power in this respect. There is, of course, no express contract stipulation herein which would permit the award. Nor is there any specific statutory provision to work an exception to Section 177 (a) in the circumstances of this case.[12] The court below baldly assumed

[12] In its opinion, the court below referred to its allowance of interest as being on "* * * the judgments of the Customs

a general power to award interest on claims against the United States whenever, in its opinion, Government officials (in this case, the Comptroller General) take more than a reasonable time to

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Court * * *" (R. 26). No provision of customs law authorizes the payment of interest on customs duty refunds pursuant to Customs Court decisions. On the contrary, regulations issued by the Treasury Department specifically prohibit such payments of interest. Customs Regulations, 1931, Art. 862, pp. 536–537; Customs Regulations, 1937, Art. 861, p. 490; Customs Regulations, 1943, Art. 17.4, p. 327, and Art. 24.36, p. 456, ftn. 6; Cf. *United States* v. *Sherman*, *supra*; *Stephani's Case*, 26 Int. Rev. Rec. 313, 314; *White* v. *Arthur*, 10 Fed. 80 (S. D. N. Y.). No exception to the prohibition of these customs regulations is provided by the appropriation acts which, as found by the court below, covered the refunds here involved (R. 17). Both such acts (Act of May 14, 1937, 50 Stat. 137, 142; Act of June 25, 1938, 52 Stat. 1114, 1149) are silent on the question of the allowance of interest on refunds. See 7 Op. A. G. 523, 525.

Some effort was made by respondents in the court below to claim interest under the provisions of the Act of March 3, 1875, c. 149, 18 Stat. 481, as amended, 31 U. S. C. 227. This statute, which applies exclusively to setoffs urged by the United States in respect of judgments against the United States presented for payment, is clearly not applicable in the instant case. Here, no setoff on the part of the United States was involved. The refusal of the Collector of Customs and of the General Accounting Office to turn the customs duty overpayment checks or the proceeds over to respondents arose solely in the exercise of a reasonable caution by those officials in the performance of their duties. Moreover, it may well be doubted that a "judgment" of the Customs Court is the type of judgment to which the Act refers. A decision of the Customs Court is a declaratory decree, *Brook* v. *Mantel-Witté Co.*, 54 F. 2d 992, 994 (C. C. A. 2), and not a money judgment.

act on the demands of private claimants.[13] Although the court below recognized the facts and circumstances of this case as a "* * * maze of reorganizations and transfers of assets and confusion * * *", and commended the desire of the Comptroller General to protect the interests of the United States, it nevertheless found that the burden of establishing valid ownership of the customs duty fund had somehow shifted to the Government and that the problem should have been clearly resolved by the Comptroller General by April 19, 1941 (R. 25–26).[14] We do not believe

[13] That this is not an isolated instance of the improper allowance of interest by the court below is evidenced by its decision in *Thayer-West Point Hotel Co.* v. *United States*, No. 45874, decided March 4, 1946. In that case the decision allowing interest is in clear conflict with applicable decisions of this Court, e. g., *United States* v. *Goltra*, *supra*. A petition for a writ of certiorari is also being filed in that case.

[14] A primary issue in the court below was the question of the capacity of Nyrayco to appear as plaintiff in the United States Customs Court after it had been abolished by proclamation for nonpayment of franchise taxes. The court below decided that Nyrayco's lack of capacity had been cured by an amendment to the New York Corporation Law on April 19, 1941 and chose this date to start the running of interest against the Government. There is nothing in the record to suggest that the caution exercised by the Comptroller General with regard to release of the customs duty fund stemmed solely from doubt as to Nyrayco's status as a plaintiff in the Customs Court proceeding. Further, it should be noted that the date chosen by the court below to start the running of interest was almost a year before the consent declaratory judgment obtained by respondents in the New York Supreme Court and substantially two years before attorneys for the interested corporations offered to give consent of Rayon #2 if the fund were released to Rayon #1 and Nyrayco.

that the Comptroller General acted unreasonably in insisting that the United States be protected by the judgment of a court of competent jurisdiction. But even if it be assumed that his actions herein were unreasonable, it does not follow that any power thereupon arose in the Court of Claims to award interest to respondents. On the contrary, this Court has specifically held that Section 177 (a) prohibits the allowance of interest by the Court of Claims even if payments have been unreasonably delayed by officers of the Government. *Tillson* v. *United States*, 100 U. S. 43; *United States* v. *Verdier, supra*, at p. 218.

2. The question here presented is one of importance. As a matter of law, the court below should not be permitted to ignore Section 177 (a) of the Judicial Code and to extend a waiver of Governmental immunity contrary to the legislative mandate. As a monetary matter, the general importance of the review sought herein can not be overemphasized. An unpredictable increase in the financial burden of the Government would result if trial courts should be left entirely free to award interest in cases where they find that there has been improper delay by Government officials in the payment of money found to be due to claimants. In the case at bar, for example, the interest alone exceeds $100,000.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

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